

SERVICE DATE - MARCH 25, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42069

DUKE ENERGY CORPORATION

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Decided: March 21, 2003

On January 15, 2003, Duke Energy Corporation (Duke) and Norfolk Southern Railway Company (NS) filed briefs in this maximum rate reasonableness complaint proceeding.¹ Along with its brief, NS submitted two tables, labeled “2002 2nd Half NS Traffic Volumes for the ACC Origin-Destination Selection” and “2002 Duke Power Traffic Shipments.” On January 22, 2003, Duke asked that this material be rejected as untimely.² We grant that request.

DISCUSSION AND CONCLUSIONS

In complex proceedings such as this one, briefs, properly employed, serve to focus the issues and assist us in analyzing the record. But new evidence in briefs is prohibited; the parties are simply to summarize the evidence already in the record and direct our attention to the issues the parties deem critical. Indeed, in our decision served on December 13, 2002, scheduling the submission of briefs in

¹ The complaint challenges the reasonableness of rates for movements of coal by NS from origins in Virginia, West Virginia, and Kentucky to Duke’s electricity generating facilities at Belmont, Walnut Cove, Spencer, and Eden, NC. Opening, reply, and rebuttal evidence was filed on May 24, 2002, September 30, 2002, and November 19, 2002, respectively.

² In a letter filed January 24, 2003, NS responded that the material, consisting of actual 2002 traffic data, was submitted in response to the allegation made in Duke’s rebuttal that NS had withheld this information in order to understate the likely traffic volumes for the stand-alone railroad. In a letter filed January 29, 2003, Duke objected that NS’s filing is unauthorized surrebuttal that should be rejected under 49 CFR 1104.8 and 1104.10. Alternatively, Duke submitted comments addressing the new material. NS filed a letter on February 4, 2003, to “correct errors” in Duke’s January 29 commentary. Because we are rejecting the tables submitted by NS with its brief, we need not consider these supplemental filings.

this case, the parties were reminded that “new evidence is not permitted in briefs and will be subject to motions to strike and other sanctions.”

The record must close at some point. Absent a clearly defined cut-off point that is observed by all, one party or the other could always point to some new piece of data to bolster its arguments. Both parties in a rate reasonableness proceeding have ample opportunity to support their case in their scheduled evidentiary submissions. If a party wishes to introduce further material at a later stage, it must file a petition to supplement the record. Such a petition should show that the information sought to be introduced is central to the petitioning party’s case, could not reasonably have been introduced earlier, and would materially influence the outcome of the proceeding.

NS has not made such a showing here. Instead, it attempted to include new evidence with its brief, contrary to the explicit instructions in our December 13, 2002 decision, and it sought to justify its submission only after Duke objected. Accordingly, we will not allow the new evidence in this case.

It is ordered:

1. The tables submitted with defendant’s brief are rejected.
2. This decision is effective on its service date.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams
Secretary